United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1329

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Docket No. 76/1329

CALVIN McCRAY,

Defendant-Appellant.

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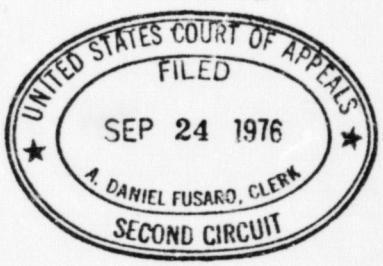
APPELLANT'S BRIEF



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PRELIMINARY STATEMENT

This appeal is taken from the Judgment of Conviction by Judge Jack Weinstein on the 18th day of June, 1976, and thereafter concluded on the 23rd day of June, 1976.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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APPELLANT'S BRIEF

FACTS AND PROCEEDINGS BELOW

CALVIN McCRAY was indicted for three alleged violations of the National Firearms Registration and Transfer Act, Title 26, U.S.C. Secs. 5841, 5861(d), and 5871. In specific terms, McCRAY was accused of being the owner or possessor of a sawed-off shotgun as defined in the Act, and that, either as principal or abettor along with one Albert Boucknight (a co-defendant not joined herein) sold the weapon to an undercover agent of the Alcohol and Tobacco Unit of the Treasury Department.

The second count of the indictment was basically the same as the first count, save that in this particular count,

McCRAY was accused of having transferred the weapon to the government agent, also either as a principal or aider and abettor to Boucknight.

The third count against McCRAY alleges that he conspired with Boucknight to commit a crime against the United States.

The matter came on for trial before Judge Weinstein and a jury on April 21, 1976, and thereafter culminated in a verdict on the matter on April 23, 1976. The jury found the defendant McCRAY not guilty of counts 1 and 3, but guilty of count 2. On June 8, 1976, defendant McCRAY was sentenced by Judge Weinstein to five years in prisonment, execution suspended and he was placed on probation for five years and fined the sum of $1,500.00.

At the time that the verdict was announced by the jury, the defendant moved to set aside the verdict as being inconsistent. This was denied by the Judge. The defendant appeals from the denial of this motion and the exceptions to the charge to the jury by the Court, which were raised at the time that the jury came back for clarification.

SUMMARY OF ARGUMENT

Defendant McCRAY urges that the jury's verdict of

guilty on the second count was inconsistent with their determination of not guilty on the first and third counts. The verdict of guilty on the second count had to be and, indeed was based on the same evidence that was presented to the jury for counts one and two. Since the jury found that McCRAY never possessed the gun in the first instance and was not an aider or abettor to Boucknight in the possession, therefore, is how could he have transferred something he never possessed? The necessary ingredient concerning the transfer was spelled out by the Judge in his charge as being initially in possession. Clearly, therefore, if he was never in possession of the said weapon he could never have transferred it.

Secondly, when the jury found McCRAY not guilty of conspiring with Boucknight to commit a crime (namely either that he never was in possession of the weapon, or acted in concert with Boucknight), how, therefore, could he ever have formed the necessary guilty knowledge of a crime that he was never even a part of. Criminal intent is still a necessary ingredient. Two Critical elements must be present before a defendant may be properly convicted of either aiding and abetting in the commission of a crime, to wit, the government must prove that a substantive crime had been committed, and, b) it must show that the defendant had knowledge of a substantive offense and acted with an intent to

facilitate the commission of such offense. Clearly, when the jury found the defendant McCray not guilty in the first count, they found that he did not commit a substantive crime, and then when they found him not guilty on the third count, they indeed found that he had no knowledge of the commission of the substantive crime.

The further contention of the defendant McCRAY was that the jury was puzzled by the problem insofar as the elements of count one and two, and came to the Court for instruction. The Judge's charge, on page 31 of the minutes of the Charge to the Jury and the request for information contained therein, indicate that Juror 8, who spoke for the rest of the jurors, were trying to separate the questions and, indeed could not do that. The Court specifically charged the jury that the question of possession in count one was identical to possession insofar as count two, such possession being necessary in order to effect such transfer. Clearly, the jury was confused. On page 6 of the Charge to the Jury, the Court specifically spelled out that possession was an essential element of the crime in count one. On page 12 of the charge to the jury, the Court again specifically admonished the jury that possession is one of the elements necessarily to be proved with respect to the second count of the indictment. When the jury came back for instruction, the Court clearly erred in

advising them that there was no relationship between the two counts, when in fact, it had previously charged the jury that the elements necessary in both of those counts were identical.

ARGUMENT

POINT I

AS A MATTER OF LAW, THE FACT THAT THE JURY FOUND THE DEFENDANT NOT GUILTY IN COUNTS ONE AND THREE PRECLUDED THEM FINDING HIM GUILTY OF COUNT TWO.

Sometimes the highways and by-ways of the law are cluttered with inconsistencies, logical inconsistencies that disturb both the conscience and the body of the law, yet these inconsistencies continue for no other apparent reason save that so it has been and so, therefore, it must continue. In the instant case it is submitted that the verdict of the jury was so inconsistent that it violated the body of logic as well as the conscience of law.

In the instant case, the jury found McCRAY not guilty (either as principal, insofar as the possession of the weapon, or as an aider and abettor) and therefore in constructive possession of the weapon in the first count. They further found that McCRAY was not guilty of conspiring to commit a crime in the third count.

The Court, in its Charge to the Jury, clearly set out

that the necessary elements of the crimes in counts one and two had to include the question of possession. There was no separate or other evidence presented by the prosecution during the course of the trial to distinguish this element of possession for either of the two counts. It was always the position of the prosecution throughout the entire case that McCRAY was the possessor of the weapon and that he did transfer the weapon, either as principal or aider and abettor.

Indeed, logically, the government had to take such a position since they believed he was the possessor of the weapon for all purposes of counts one and two. They further maintained that he conspired to commit a criminal act along with Bouchnight. They could hardly, therefore, offer any evidence to the contrary.

When the jury found the defendant not guilty of count one, they clearly held that he did not possess the gun, nor was he an aider or abettor of Boucknight insofar as the possession was concerned. Indeed, the converse readily came into view. The jury found impliedly that since McCRAY was not guilty of possession, Boucknight, therefore, was the one who was the possessor. In reaching its conclusion as to McCRAY's guilt, therefore, on the second count, where possession was a

necessary element to be proved by the government, the jury relied on the same evidence presented to it. Since they had already eliminated McCRAY's possession in the very first count, they could not, thereafter, find him guilty of possession on the second count. And, yet, this is what they did. Clearly, this is against the weight of the evidence, certainly it is against the weight of the law.

Clearly, where the indictment alleges several counts, none of which are separate and independent crimes, and all of which contain the essential elements necessary to be proved, the finding of not guilty on the first and third counts clearly precluded the inconsistent finding of guilty on the second count. This matter clearly is distinguishable insofar as the present view of this Court and its reluctance to disturb inconsistent verdicts reached by the jury, as enunciated in Marshallo v. United States (C.C.A. 2) 298 F.74; Steckler v. United States (C.C.A.2) 7 F. 2d 59; Carroll v. United States (C.C.A. 2) 16 F. 2d 951.

In the matters cited above, it seemed apparent that there were separate and independent crimes that were charged in the same indictment, each however, had separate proof offered with respect to the essential different elements of the crime of which the defendant was accused. In the instant case, the

elements of possession had to be the same in count one and count two, and therefore, the inconsistency cannot stand as a matter of law. Once they found him not guilty of possession in the first count, McCRAY was no longer able to be found guilty of possession in the second count, and therefore, as a matter of law that verdict should have been set aside. See Curry v. United States, 18 F. 2d 509. See also Rosenthal v. United States (C.C.A. 9) 276 F. 714.

In further support of the manifest legal inconsistency as a matter law, the fact is that the jury found that McCRAY was not guilty of conspiring with Boucknight to commit a crime. Since he didn't conspire to commit the crime, which necessarily had to include both counts one and two, how could he, therefore, in any way have been guilty of the transfer of the weapon or even assisting in the transfer of a weapon. The mere fact that he was present at the time that the gun was transferred does not make him, in the absence of any other evidence, an involved person in a criminal enterprise. See United States v. Sanchez (C.A. Texas 1975) 508 F. 2d 388. The elements necessary to be proved by the government require that there be a substantive crime committed, and it must be shown that the defendant had knowledge of the substantive offense, and acted with an intent to facilitate the commission of such

offense. See United States v. William,(D.C.Pa.) 1975,391 F. Supp. 741. There had to be some evidence separate and apart from what the government presented which would have showed that there was some active participation that McCRAY had in carrying out the particular act. Such was not the case in this matter. In order to make the criminal venture succeed, that is the transfer, then there has to be some willful act on his part to have acted in a criminal conspiracy. Since McCRAY was not in possession of the weapon, and since he didn't conspire with Boucknight to commit a crime, these elements were lacking in the case. See United States v. Ehrenberg (D.C.Pa 1973) 354 F. Supp. 460, Aff'd 485 F. 2d 682, Cert. denied 416 U.S. 906, 94 S.Ct.1612.

It further follows that since they did not find him guilty of a conspiracy, his/criminal state of mind did not exist because he wasn't aware of any crime that was taking place. Unknowing participation in an act is not sufficient to constitute an offense. See United States v. Newman (C.A. Pa. 1974) 495 2d 139. See also United States v. Greer (C.A. Ill. 1972) 467 F. 2d 1064, Cert. denied 410 U.S. 929, 93 S.Ct. 1364.

For all of the reasons cited above, the failure of logical inconsistency as well as legal cohesiveness mandate

that the inconsistent verdict was improper and counter to law.

POINT II

JUDGE'S CHARGE TO THE JURY IN RESPONSE TO ITS QUESTION CONCERNING THE INDEPENDENT RELATIONSHIP OF THE TWO CRIMES IN THE ABSENCE OF PROOF SEPARATING THE TWO CRIMES - COUNT ONE AND COUNT TWO - WAS ERROR.

When Judge Weinstein was requested for clarification on page 31 and again page 32 of the minutes of the Charge to the Jury, juror No. 8 raised the question on behalf of the rest of the jurors with respect to the possession, it is submitted that the Court erred in indicating that the possession in both cases was independent. True enough, each of the charges in the indictment was an independent allegation, but, nonetheless, the evidence adduced during the course of the trial relative to possession was the same for count one and count two. Therefore, each was dependent upon the other - the possession in count one had to be the same possession as it was in count two. Neither count could really exist without the other. They each supported one another. Therefore, when the Court advised that the possession in the second count could be separate and distinct from the possession in the first count, it erred.

CONCLUSION

FOR THE REASONS STATED HEREIN, THE GUILTY VERDICT IN THE SECOND COUNT MUST BE SET ASIDE AND THE DEFENDANT FOUND NOT GUILTY OF ALL THREE COUNTS.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against- DOCKET NO. 76/1329

CALVIN McCRAY,

Defendant-Appellant.

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STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

GAIL ACKER, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at Mineola, New York.

That on the 21 day of September, 1976, deponent served the within Appellant's Brief upon the UNITED STATES ATTORNEY at the U.S. Attorney's offices at the United States District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Gail Acker

Sworn to before me this
21 day of September, 1976.

Elise Harris

ELISE HARRIS
NOTARY PUBLIC, State of New York
No. 30-4604192
Qualified in Nassau County
Commission Expires March 30, 19 78